Calendar No. 137

100TH CONGRESS
1st Session

SENATE

REPORT
100–61

AIRLINE COMPETITION ACT

MAY 29, 1987.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 806]

The Committee on the Judiciary, to which was referred the bill (S. 806) to amend Section 1601 of the Federal Aviation Act of 1958 (49 United States Code 1551(a)(6)) and Section 7 and 11 of the Clayton Act (15 United States Code 18, 21) to make airline mergers, acquisitions, interlocking directorates, and agreements involving interstate and overseas air transportation subject to the ordinary operation of the antitrust laws rather than the Department of Transportation regulatory oversight, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
I. Purpose	2
II. Legislative History	2
III. Committee Action	4
IV. Text of S. 806	4
V. Section-by-Section Analysis	5
VI. Congressional Budget Office Cost Estimate	7
VII. Regulatory Impact Statement	8
VIII. Changes in Existing Law	8
IX. Additional Views of Senator DeConcini	15

91-010

S5523-1

I. Purpose of S. 806

S. 806, as amended, would make airline mergers, acquisitions, interlocking directorates, and agreements involving interstate and overseas air transportation [1] subject to the ordinary operation of the antitrust laws rather than the Department of Transportation regulatory oversight. It would transfer review of the competitive effects of such transactions and arrangements to the courts under the antitrust laws, as enforced by the Department of Justice. It also would make certain conforming amendments to the antitrust laws to ensure that these transactions and arrangements are effectively covered.

II. Legislative History of S. 806

S. 806, The Airline Competition Act of 1987 was introduced on March 20, 1987, by Senator Howard M. Metzenbaum (D–Ohio) and Senator Warren B. Rudman (R–N.H.). It was referred to the Committee on the Judiciary and retained at full committee level for consideration.

Prior to the deregulation of the airline industry, authority over airline mergers was held by the Civil Aeronautics Board. Under Section 408 of the Federal Aviation Act, in reviewing mergers the Board was to weigh both the potential anticompetitive impact of the merger and the "significant transportation conveniences and needs of the public."

Similarly, the Board had authority to approve interlocking relationships among air carrier directors and agreements (over scheduling, for example) among air carriers under Section 409 and Section 412, respectively, of the Federal Aviation Act. Finally, Section 416 of the Act gave the Secretary of Transportation authority to grant immunity from the antitrust laws to any arrangement approved by the Board under Sections 408, 409, or 412.

The Airline Deregulation Act of 1978 (Public Law 95–504) transferred the Board's authority under Sections 408 and 409 with respect to interstate and overseas air transportation, and the corresponding authority under Section 414, to the Department of Justice, effective January 1, 1983.

In 1982 before this transfer could occur, Congress added a provision to the Aviation Insurance Program (Public Law 97–309) extending the transfer date to January 1, 1985. In 1984, that provision was nullified by an amendment to the Civil Aeronautics Board Sunset Act of 1984. (Public Law 98–443), that sunsetted Section 408, 409, and 412 authority, and the corresponding authority contained in Section 414, for interstate and overseas air transportation, as of January 1, 1989.

In the 99th Congress, the issue was revisited briefly when Senator Rudman proposed to immediately transfer antitrust authority to the Department of Justice as part of the 1987 appropriations process. This proposal was never enacted.

---

[1] The terms "interstate and overseas air transportation" are defined in Section 101 of the Federal Aviation Act as transportation either wholly within the United States or transportation between or among the United States and its Territories or possessions. The terms do not encompass transportation to foreign nations.

An unprecedented number of mergers in the airline industry is the impetus for Congress to once again consider changing the sunset date of the Department of Transportation's antitrust authority over interstate and overseas air transportation. Since 1985, the Department of Transportation has approved a dozen mergers between scheduled air carriers, and industry concentration has reached record levels.

In three cases, the sale of Pan Am's Pacific routes to United, the TWA-Ozark merger, and the Northwest-Republic merger, the Department of Transportation actually approved acquisitions over the objections of the Department of Justice.[2] In supporting the mergers, the Department of Transportation relied heavily on the possibility of new entry as a competitive force, while the Department of Justice, in opposing the mergers, relied on concentration ratios.

Although it is still early to properly assess the impact of those mergers on airfares, the seven studies conducted of airline pricing since deregulation have reached two conclusions that support the Justice position: First, market concentration ratios have a significant impact on fares; and second, the most powerful competitive force on airfares is the actual entry of new competitors. (Testimony of Alfred Kahn before the Subcommittee on Antitrust, Monopolies and Business Rights, March 25, 1987.)

On March 25, 1987, the Subcommittee on Antitrust, Monopolies and Business Rights held a hearing on the impact of airline deregulation, the hearing addressed the issue of which Federal agency should have antitrust jurisdiction over the airlines. At that hearing, witnesses for both the Department of Transportation and the Department of Justice testified in favor immediately ending Transportation's merger authority so that the interstate and overseas airline transportation industry would be treated just like any other industry. Both agencies testified that they would support sunsetting the Section 412 authority if sufficient time were allowed to permit an orderly transition from Transportation oversight to Justice oversight.

In addition to the two administration witnesses, Alfred E. Kahn, professor of political economy at Cornell University, and former chairman of the Civil Aeronautics Board, testified that "It is essential that Congress take active steps to ensure that the policies of the antitrust laws be more aggressively applied in the airline industry;" he also endorsed sunsetting the Transportation Department's antitrust authority.

William W. Winpisinger, international president, International Association of Machinists and Aerospace Workers, similarly urged that antitrust authority over airline industry be moved to the Justice Department. The same recommendation was made by Cornish Hitchcock, legal director of the Aviation Consumer Action Project.[3]

---

[2] Acquistions involving the transfer of foreign routes would continue to fall under the jurisdiction of the Department of Transportation under S. 806.

[3] In fact, only one witness, Edward R. Beauvais, Chairman of the Board and Chief Executive Office of America West Airlines, Incorporated, of Temple, Arizona expressed reservations about sunsetting the Department of Transportation's antitrust authority. Mr. Beauvais' concerns are discussed in the concurring views of Senator DeConcini.

III. Committee Action

S. 806 was considered by the Committee on the Judiciary on April 8, 1987. An amendment in the nature of a substitute was proposed by Senator Metzenbaum and Senator Thurmond. The purpose of the amendment was to substitute language drafted with technical assistance from the Departments of Transportation and Justice for the original text of S. 806; to establish a sunset date of October 1, 1987, for the Department of Transportation's Section 412 authority; and to clarify that the bill would not apply to any merger pending before the Department of Transportation before April 1, 1987.

The amendment was adopted by a vote of 9 to 0, and the bill as amended was reported favorably by a vote of 9 to 0.

IV. Text of S. 806

A BILL To provide that the Clayton Act and Sherman Act apply to the Air transportation industry

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Airline Competition Act of 1987."

Sec. 2. Paragraph (a)(6) of section 1601 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1551(a)(6)), is amended to read as follows:

"(6) Sections 412(a) and (b) of this Act (to the extent such sections relate to interstate and overseas air transportation) and section 414 of this Act (to the extent such section relates to orders made under sections 412(a) and (b) with respect to interstate and overseas air transportation), the authority of the Secretary of Transportation under such sections (to the same extent), and all orders adopted under the provisions of sections 412(a) and (b) and all exemptions granted under section 414 (relating to interstate and overseas air transportation) shall cease to be in effect on October 1, 1987; *Provided,* That no conduct prior to October 1, 1987, pursuant to an order and exemption in effect at the time of such conduct, shall be subject to the antitrust laws as set forth in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12(a)).".

Sec. 3. Paragraph (a)(7) of section 1601 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1551(a)(7)), is amended to read as follows:

"(7) Sections 408 and 409 of this Act and section 414 of this Act (relating to such sections 408 and 409) and the authority of the Secretary of Transportation under such sections (to the same extent) shall cease to be in effect on the date of enactment of this paragraph; *Provided,* That rights, duties, and obligations arising (1) in proceedings commenced before the Department of Transportation prior to April 1, 1987, or (2) pursuant to final orders adopted by the Secretary or the Board

under the provisions of sections 408 and 409 prior to the date of enactment of this paragraph, shall be administered and, as necessary, adjudicated, as if the sections were not terminated.".

SEC. 4. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by—

(1) in the first and second paragraphs, inserting ", nor any air carrier or foreign air carrier subject to the Federal Aviation Act of 1958, as amended, person controlling such air carrier or foreign air carrier, other common carrier, or person substantially engaged in the business of aeronautics," immediately after "Federal Trade Commission" each time it appears; and

(2) in the final paragraph, striking out "Secretary of Transportation,".

SEC. 5. Section 11 of the Clayton Act (15 U.S.C. 21) is amended by—

(1) in subsection (a), striking out "in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, as amended;" and inserting "except air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, as amended," immediately after "other character of commerce"; and

(2) in subsections (b) through (*l*), striking out "Commission, Board, or Secretary" (whehter or not the words are capitalized) wherever it appears and inserting in lieu thereof "commission or board".

V. SECTION-BY-SECTION ANALYSIS

Section 1 provides that the Act may be cited as the "Airline Competition Act of 1987."

Section 2 provides for the early sunset of existing Transportation Department authority to approve and exempt from the antitrust laws airline agreements relating to interstate and overseas air transportation. (Overseas air transportation refers to transportation between a state and a territory or possession of the United States such as Puerto Rico or Guam; it does not include transportation to foreign nations.) This authority, contained in Sections 412 and 414 of the Federal Aviation Act of 1958, as amended, currently is scheduled to expire on January 1, 1989. Section 2 amends section 1601(a)(6) of the Federal Aviation Act to terminate the authority as of October 1, 1987. This delayed expiration date will permit airlines currently under an antitrust exemption order from the Department of Transportation to comply with the Justice Department's antitrust enforcement policy.

Section 2 also makes clear that all orders adopted and antitrust exemptions granted under the terminated authority will cease to be in effect on October 1, 1987, but that antitrust protection for exempted conduct engaged in prior to October 1, 1987, is not retroactively lost. In effect, this section removes all special treatment of domestic agreements among airlines; after October 1, 1987, such

agreements will be treated under the antitrust laws like agreements in any other unregulated industry.

Section 3 provides for the early sunset of the existing authority of the Secretary of Transportation over airline mergers and acquisitions and interlocking directorates among airlines, including the authority to exempt such transactions and interlocking directorates from the antitrust laws. This authority, contained in sections 408, 409, and 414 of the Federal Aviation Act of 1958, as amended, is currently scheduled to terminate on January 1, 1989. Section 3 amends section 1601(a)(7) of the Federal Aviation Act to terminate the authority immediately.

In order to provide a smooth transition, Section 3 also provides that proceedings commenced at the Transportation Department prior to April 1, 1987, may be administered and adjudicated as if the Transportation Department authority had not been terminated. Thus, transactions in which administrative proceedings are already under way at the Department, like the Piedmont-US Air merger, could proceed to final determination at Transportation.

In addition, rights, duties, and obligations arising pursuant to final orders adopted by the Secretary of Transportation or the Civil Aeronautics Board prior to the date of enactment shall also be administered and adjudicated as if the authority was not terminated. Thus, transactions for which administrative authority has been finally exercised will remain in the same legal posture that they are in today.

Sections 4 and 5 contain conforming amendments to Section 7 and Section 11 of the Clayton Act, respectively, that are necessary to apply the antitrust laws fully to airline mergers and acquisitions. The conforming amendments to the Clayton Act, taken together, have the effect of subjecting all airline mergers to the same substantive standards as mergers in unregulated industries. Challenges to airline mergers would be authorized by the Department of Justice or private plaintiffs.

Section 4 adds language to Section 7 of the Clayton Act (15 U.S.C. 18) to ensure that it will cover all asset acquisitions now covered by section 408 of the Federal Aviation Act. Certain acquisitions of assets, are covered by Section 7 only if the acquisition is by a person "subject to the jursidiction of the Federal Trade Commission (FTC)." Air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 are not subject to the jurisdiction of the FTC under Section 5 of the FTC Act [see 15 U.S.C. 45(a)(2)] or under Section 11 of the Clayton Act (15 U.S.C. 21).

This Act does not establish FTC jurisdiction under either Section 5 of the FTC Act or Section 11 of the Clayton Act. Thus, Section 4 adds new language to Section 7 of the Clayton Act to ensure that all asset acquisitions now covered by Section 408 of the Federal Aviation Act will be subject to the antitrust laws, regardless of whether the acquiring firms are subject to the jurisdiction of the Federal Trade Commission.

Section 4 also strikes the language in the last paragraph of Section 7 of the Clayton Act that expressly excludes from Section 7 challenge any transactions consummated pursuant to authority given by the Secretary of Transportation.

Section 5 amends Section 11 of the Clayton Act by eliminating the current authority of the Secretary of Transportation to enforce Sections 2, 3, 7, and 8 of the Clayton Act with respect to airlines. The elimination of this authority is appropriate in light of the intent of the Act to terminate all antitrust authority of the Department of Transportation over airlines, with the exception of its authority over international aviation agreements. Also, because this Act is intended to do no more than complete the transfer of the competitive review authority of the Department of Transportation to the Department of Justice under the antitrust laws, Section 5 excludes airlines from the FTC's antitrust authority under Section 11 of the Clayton Act.

VI. Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, April 28, 1987.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 806, the Airline Competition Act of 1987, as ordered reported by the Senate Committee on the Judiciary, April 8, 1986. CBO estimates that enactment of this bill would result in a savings of up to $200,000 to the federal government and in no cost to state or local governments.

S. 806 would terminate Department of Transportation (DOT) antitrust authority over interstate air transportation. The Department of Justice (DOJ) would assume antitrust authority over the industry. The bill would terminate immediately DOT's authority over mergers and interlocking directors and would terminate DOT's authority over airline agreements as of September 30, 1987. Under current law, DOT antitrust authority is to sunset January 1, 1989. DOT would continue to have authority over foreign air transportation.

Currently DOJ may comment on proposed mergers. According to information provided by DOJ, S. 806 would not require any increase in resources already expended by the Department to prepare these comments. According to information provided by DOT, cost savings resulting from the earlier termination dates could be as high as $200,000, largely in fiscal year 1988. The magnitude of such savings would depend on the number of proposed mergers.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

James Blum
(For Edward M. Gramlich, Acting Director).

VII. Regulatory Impact Statement

In compliance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concluded that this bill will not have any regulatory impact.

VIII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing laws proposed to be made by S. 806 are shown as follows: Existing law to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman.

United States Code Annotated

* * * * * * *

Title 15—Commerce and Trade

CHAPTER 1.—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

* * * * * * *

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission, *nor any air carrier or foreign air carrier subject to the Federal Aviation Act of 1958, as amended, person controlling such air carrier or foreign air carrier, other common carrier, or person substantially engaged in the business of aeronautics,* shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission, *nor any air carrier or foreign air carrier subject to the Federal Aviation Act of 1958, as amended, person controlling such air carrier or foreign air carrier, other common carrier, or person substantially engaged in the business of aeronautics,* shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substan-

tial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commercial or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where these is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof of the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the [Secretary of Transportation,] Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commision in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935 [15 USCS § 79j], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission or Secretary.
(Oct. 15, 1914, ch 323, § 7, 38 Stat. 731; Dec. 29, 1950, ch 1184, 64 Stat. 1125; Sept. 12, 1980, P.L. 96-349, § 6(a), 94 Stat. 1157; Oct. 4, 1984, P.L. 98-443, § 9(l), 98 Stat. 1708.)

* * * * * * *

§ 21. Enforcement provisions

(a) ADMINISTRATIVE AGENCIES AUTHORIZED TO ENFORCE COMPLIANCE.—Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act [15 USCS §§ 13, 14, 18, 19] by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended [49 USCS § 1 et seq.]; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmis-

sion of energy [in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 USCS Appx §§ 1301 et seq.]; in the Federal Reserve Board [Board of Governors of the Federal Reserve System] where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce *except air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, as amended,* to be exercised as follows:

(b) ISSUANCE OF COMPLAINTS FOR VIOLATIONS; HEARING; INTERVENTION; FILING OF TESTIMONY; REPORT; CEASE AND DESIST ORDERS; REOPENING AND ALTERATION OF REPORTS OR ORDERS.—Whenever the [Commission, Board, or Secretary] *commission or board* vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act [15 USCS §§ 13, 14, 18, 19], it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the [Commission, Board, or Secretary] *commission or board* requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the [Commission, Board, or Secretary] *commission or board* to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the [Commission, Board, or Secretary] *commission or board* If upon such hearing the [Commission, Board, or Secretary] *commission or board* as the case may be, shall be of the opinion that any of the provisions of said sections [15 USCS §§ 13, 14, 18, 19] have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself, of the directors chosen contrary to the provisions of sections 7 and 8 of this Act [15 USCS §§ 18, 19], if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the [Commission, Board, or Secretary] *commission or board* may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report, or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the [Commission, Board, or Secretary] *commission or board* may at any time, after notice and opportunity for

hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the [Commission, Board, or Secretary] *commission or board* conditions of fact or of law have so changed as to require such action or if the public interest shall so require: provided, however, That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) REVIEW OF ORDERS; JURISDICTION; FILING OF PETITION AND RECORD OF PROCEEDING; CONCLUSIVENESS OF FINDINGS; ADDITIONAL EVIDENCE; MODIFICATION OF FINDINGS; FINALITY OF JUDGMENT AND DECREE.—Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the [Commission, Board, or Secretary] *commission or board* be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the [Commission, Board, or Secretary] *commission or board* and thereupon the [Commission, Board, or Secretary] *commission or board* shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the [Commission, Board, or Secretary] *commission or board* and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the [Commission, Board, or Secretary] *commission or board* as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the [Commission, Board, or Secretary] *commission or board* is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission, board, or Secretary. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the [Commission, Board, or Secretary] *commission or board,* the court may order such additional evidence to be taken before the [Commission, Board, or Secretary] *commission or board,* and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The [Commission, Board, or Secretary] *commission or board* may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which if supported by subsantial evidence, shall be conclusive, and

its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code [28 USCS § 1254].

(d) [Unchanged]

(e) LIABILITY UNDER ANTITRUST LAWS.—Such No order of the [Commission, Board, or Secretary] *commission or board* or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

(f) SERVICE OF COMPLAINTS, ORDERS AND OTHER PROCESSES.—Complaints, orders, and other processes of the [Commission, Board, or Secretary] *commission or board* under this section may be served by anyone duly authorize by the [Commission, Board, or Secretary] *commission or board* either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

(g) FINALITY OF ORDERS, GENERALLY.—[Introductory matter unchanged]

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the [commission, board, or Secretary] *commission or board* may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission, board, or Secretary has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the [Commission, Board, or Secretary] *commission or board* has been affirmed or the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the [commission, board, or Secretary] *commission or board* be affirmed or the petition for review be dismissed.

(h) FINALITY OF ORDERS MODIFIED BY SUPREME COURT.—If the Supreme Court directs that the order of the [Commission, Board, or Secretary] *commission or board* be modified or set aside, the order of the [Commission, Board, or Secretary] *commission or board* rendered in accordance with the mandate of the Supreme Court

shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the [Commission, Board, or Secretary] *commission or board* shall become final when so corrected.

(i) FINALITY OF ORDERS MODIFIED BY COURT OF APPEALS.—If the order of the [Commission, Board, or Secretary] *commission or board* is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the [Commission, Board, or Secretary] *commission or board* rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the [Commission, Board, or Secretary] *commission or board* was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the [Commission, Board, or Secretary] *commission or board* shall become final when so corrected.

(j) FINALITY OF ORDERS ISSUED ON REHEARING ORDERED BY COURT OF APPEALS OR SUPREME COURT.—If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the [Commission, Board, or Secretary] *commission or board* for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the [Commission, Board, or Secretary] *commission or board* rendered upon such rehearing shall become final in the same manner as though no prior order of the [Commission, Board, or Secretary] *commission or board* had been rendered.

(k) [Unchanged]

(l) PENALITIES.—Any person who violates any order issued by the [Commission, Board, or Secretary] *commission or board* under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the [Commission, Board, or Secretary] *commission or board* each day of continuance of such failure or neglect shall be deemed a separate offense.

(As amended Oct. 4, 1984, P. L. 98–443, § 9(m), 98 Stat. 1708; Nov. 8, 1984, P. L. 98–620, Title IV, Subtitle A, § 402(10)(B), 98 Stat. 3358.)

* * * * * * *

Title 49—Transportation

* * * * * * *

CHAPTER 20.—FEDERAL AVIATION ACT

* * * * * * *

§ 1551. Termination of Civil Aeronautics Board and transfer of certain functions

(a) Termination of authority. (1), (2) [Unchanged]

* * * * * * *

(6) Section 412(a) and (b) of this Act [49 USCS Appx § 1382(a), (b)] (to the extent such sections relate to interstate and overseas air transportation) and section 414 of this Act [49 USCS Appx § 1384] (to the extent such section relates to orders made under sections 412(a) and (b) [49 USCS Appx § 1382(a), (b)] with respect to interstate and overseas air transportation), [and] the authority of the Secretary of Transportation under such sections (to the same extent) , *and all orders adopted under the provisions of sections 412 (a) and (b) and all exemptions granted under section 414 (relating to interstate and overseas air transportation)* shall cease to be in effect on [January 1, 1989.] *October 1, 1987. Provided, That no conduct prior to October 1, 1987, pursuant to an order and exemption in effect at the time of such conduct, shall be subject to the antitrust laws as set forth in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12(a)).*

(7) Sections 408 and 409 of this Act [49 USCS Appx §§ 1378, 1379] and section 414 of this Act, [49 USCS Appx § 1384] (relating to such sections 408 and 409 [49 USCS Appx §§ 1378, 1379]) and the authority of the Secretary of Transportation under such sections (to the same extent) shall cease to be in effect on [January 1, 1989] *the date of enactment of this paragraph; Provided, That rights, duties, and obligations arising (1) in proceedings commenced before the Department of Transportation prior to April 1, 1987, or (2) pursuant to final orders adopted by the Secretary or Board under the provisions of sections 408 and 409 prior to the date of enactment of this paragraph, shall be administered and, as necessary, adjudicated, as if the sections were not terminated.*

* * * * * * *

IX. ADDITIONAL VIEWS OF SENATOR DECONCINI

I am sure that all members of this committee are concerned about the manner in which the Transportation Department has exercised its responsibilities with respect to airline mergers. The airline industry has, as a consequence of the Transportation Department's approval of these mergers, gone from a largely unconcentrated to a highly concentrated industry in less than two years. There is a serious question as to whether the important goals of airline deregulation and improved service provided at fares determined by effective competition can be achieved in the future.

Thus, while I voted to report this bill in order to focus attention on this issue, I have several reservations about whether to transfer this authority from the Department of Transportation to the Justice Department is the right answer.

First, it is critically important to recall that while Justice has been more vigorous than the Transportation Department in its analyses of certain airline mergers, the current Justice Department certainly does not have the reputation of vigorously challenging mergers and acquisitions in other industries in the context of its Hart-Scott-Rodino and general antitrust responsibilities.

Second, Justice has itself acquiesced in many of the airline mergers that have led to the increased concentration in the industry. It is important to note that the Justice Department, although it participated vigorously in several of the airline cases, never took any of the Transportation Department the airline cases, never took any of the Transportation Department decisions to court, as it did, for example, in challenging the anticompetitive capacity decisions of the Civil Aeronautics Board in the mid-1970's.

Third, I am concerned about the short time periods and essentially secretive processes under the Hart-Scott-Rodino Act and the fact that an on-the-record hearing will not be held at the Department of Justice. Under the reported bill, it is not clear to me that there will be a meaningful opportunity for public input and deliberative consideration at Justice. If the Justice Department's proceedings are not conducted publicly, it will be difficult for Congress to exercise meaningful oversight in airline merger cases.

Finally, in light of the excessive concentration that has recently occurred in the critically important airline industry, I believe that it is necessary for the analysis in future airline merger cases to go beyond mere competitive concerns to consider important public interest and national transportation policy matters. I am concerned about whether the Justice Department, as opposed to the Transportation Department, is the proper agency to be making these decisions.

I urge the Commerce Committee to address the issues presented by the concentration in the airline industry, including the merger enforcement policy of the Department of Transportation.

○